Office Supreme Court, U.S.
FILED
JAN 2 1963
JOHN F. DAVIS, CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1962

No. 488

GUNDERSON BROS. ENGINEERING CORPORATION, an Oregon Corporation,
Petitioner,

v.

MERRITT-CHAPMAN AND SCOTT CORPORATION, a Delaware corporation,
Respondent.

PETITION FOR REHEARING

WILLIAM F. WHITE,
WHITE, SUTHERLAND & WHITE,
1200 Jackson Tower,
Portland, Oregon,
CAMERON SHERWOOD,
SHERWOOD, TUGMAN & GREEN,
Baker Building,
Walla Walla, Washington,
Attorneys for Petitioner.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-62

In the Supreme Court

of the United States

OCTOBER TERM, 1962

No. 488

GUNDERSON BROS. ENGINEERING CORPORATION, an Oregon Corporation,
Petitioner,

v.

MERRITT-CHAPMAN AND SCOTT CORPORATION, a Delaware corporation,
Respondent.

PETITION FOR REHEARING

Petitioner, Gunderson Bros. Engineering Corporation, prays for a rehearing of its petition for writ of certiorari, which was denied December 10, 1962 with the Chief Justice and Mr. Justice Black believing that certiorari should be granted, to consider whether Petitioner has been denied its right to jury trial guaranteed by the Seventh Amendment to the Constitution of the United States.

The Court of Appeals decision just published in *Merritt-Chapman and Scott Corp.* v. *Fredin* (9 Cir.,

Aug. 28, 1962) 307 F.2d 370, when compared as it must be with its earlier decision in which we are seeking a writ—*Merritt Chapman & Scott Corp.* v. *Gunderson Bros. Engineering Corporation* (9 Cir., June 19, 1962) 305 F.2d 659 — unequivocally demonstrates that the Court of Appeals not only reviewed the case at bar, but intends in the future to review like *contract* actions, upon a different standard than the ordinary negligence action. Such a policy of judicial review is repugnant to the nondiscriminatory language of the Seventh Amendment. That this Court by its silence may nurture the abhorrent policy of review apparently launched by the Court of Appeals, furnishes an additional cogent reason to grant certiorari and reverse the *Gunderson* case.

These two cases, one in tort and the other in contract, are properly compared from the viewpoint of U. S. District Judge Charles L. Powell of the Eastern District of Washington, who tried both of the cases. This, for the reason he must in the future look to the Court of Appeals and this Court for guidance in respect to ruling upon the critical post-trial motion for judgment n.o.v. and in the alternative for a new trial.

Each case was a diversity action against the same defendant, involving the same Priest Rapids Project and resulting in plaintiff's verdicts for about the same substantial sums ($98,387.10 and $91,360.00). Both were reviewed this summer by the same Court of Appeals with Circuit Judge Merrill common to the panel in each case. In each case, the critical issue was sufficiency of evidence to support a general verdict of the jury. In

each case, the trial judge had denied a motion for judgment n.o.v. and in the alternative for a new trial. However, in the *Gunderson* contract action, the trial judge was reversed, while in the *Fredin* negligence action he was affirmed.

In the *Fredin* case, a rock the size of a desk broke from the top of a 25-foot dirt embankment to roll down and strike the plaintiff. Prior to the accident, the defendant had tried to pry the rock loose, without success. Upon this factual base, the Court of Appeals found the evidence sufficient to support the general verdict for plaintiff. In justifying affirmance, the Court of Appeals adopted Washington law as its standard for review by quoting from *Gibson* v. *Spokane United Ry. Co.*, 197 Wash. 58, 84 P.2d 349, 350 (1938):

> "Where the minds of reasonable men may differ, the question (of negligence) should be submitted to the jury. If when so considered, we find there is substantial evidence to sustain the verdict, the judgment must be affirmed."

In the *Gunderson* case, this Petitioner had submitted a written offer to Respondent to furnish spillway and draft tube gates for the Priest Rapids Project which the Respondent as a general contractor was bidding to construct. In this action for breach of contract, the factual issue submitted to the jury was simply whether the Respondent through words and conduct of its officers and agents had led Petitioner to believe for almost five months that it had accepted Petitioner's offer, subject only to later issuing a perfunctory purchase order to memorialize the understanding after the Respondent

had signed the prime construction contract for which it had earlier been declared low bidder. The following was the salient evidence upon which the jury found that Respondent had accepted Petitioner's offer:

1. Respondent in the first instance had requested the special offer from Petitioner, which Respondent beneficially used and retained for almost five months (R. 4, 363, 364).

2. After being declared low bidder, Respondent telephoned Petitioner to advise that it had named Petitioner as the manufacturer of the spillway gates in its bid for the prime contract. Under the circumstances of that conversation, Petitioner understood: "it had the job" (R. 5, 169).

3. Respondent later told Petitioner that it would award a purchase order to Petitioner immediately after the prime contract was signed (R. 142) and, on another occasion: "It looks like you people have the job" (R. 166).

4. Respondent later told Petitioner it could proceed with shop drawings (first step in performance) (R. 188) and also, that Petitioner would be furnishing the draft tube gates (R. 183).

5. The same day that Respondent was declared low bidder it advised the manager of a barge line that Petitioner's figures had been used in bidding the spillway gates (R. 157) and that Petitioner would supply the spillway gates (R. 163). Four months later, Respondent wrote to a business firm in Seattle, Washington:

> "The following list of suppliers is furnished to you . . . Spillway Tainter Gates by Gunderson Bros. of Portland, Oregon. . . . Spillway bridges has not been determined yet" (R. 387, P. Ex. 8).

Had the Court of Appeals in reviewing *Gunderson* applied the standard of "where the minds of reasonable men may differ" as it did in reviewing *Fredin*, it would have been required to affirm *Gunderson* as it did Fredin. Instead, however, the Court of Appeals brought about the incongruous reversal in *Gunderson* by ignoring this traditional standard of review through the device of omitting discussion of certain evidence and interpreting other evidence into insignificance in order to reach a result contrary to the jury. This Court has since reversed the Court of Appeals for doing the very same thing in an anti-trust case. *Continental Ore Co.* v. *Union Carbide* (June 25, 1962) 370 U. S. 690.

However, the most important consideration at this time is the impact which *Gunderson* and *Fredin* make upon the bench and bar in the Ninth Circuit. With good reason, these two decisions now require trial judges in measuring delicate motions for judgment n.o.v. to apply the rule of limited review to negligence actions but not to contract actions, at least where the jury issues approach those which existed in the *Gunderson* case. Clearly, District Judge Charles L. Powell was reversed in *Gunderson* for applying the rule in *Fredin* (R. 29). It was to protect against the very thing which has here occurred that our wary ancestors included the Seventh Amendment in the Bill of Rights. The mandatory language of this Amendment leaves no room for

a Court of Appeals to employ a variable or ambulatory standard of review. Likewise, the Court of Appeals should not be permitted to apply a uniform standard of review to justify cases it desires to affirm, only to ignore such standard when bent upon reversal.

HERE IS THE LATEST
FROM THE NINTH CIRCUIT COURT OF APPEALS

In petitioner's case, the Court of Appeals completely ignored *Western Asphalt Co.* v. *Valle*, 25 Wn.2d 428, 171 P.2d 159 (1946), which petitioner contended was the controlling Washington law, and which held that the question of whether or not an implied-in-fact contract exists is for the jury.

On October 11, 1962, even after the *Fredin* case, a different panel of the same Court of Appeals in *Osborn* v. *Boeing Airplane Co.*, 309 F.2d 99, in a case involving contractual questions, did not ignore the *Western Asphalt* decision, but instead twice cited it with approval. In so doing, the court reversed the District Court for the Western District of Washington and held that the question of whether or not an implied-in-fact contract exists is for the jury.

Now is the time for this honorable Court to grant certiorari and finally resolve this confusion!

A SEVENTH AMENDMENT VIOLATION SHOULD BE PRESUMED

A further and additional reason to grant a writ rests in the proposition that the trial judge denied a motion for a new trial. One ground of respondent's motion for a new trial was the insufficiency of the evidence (R. 27). In denying the motion for new trial, the trial judge in a written opinion concluded:

> "I have considered all of the defendant's arguments in support of its Motion for New Trial. I do not believe that substantial justice requires any action on my part to set aside the verdict. The jury was, in my opinion, correctly instructed, and they returned their verdict on disputed evidence on questions of fact" (R. 33).

Upon a motion for new trial, the trial judge was not as hobbled as he was in respect to denying a motion for judgment n.o.v. (which he also did) because he possessed a broad discretionary power to not only grant a new trial if the quantum of evidence was lacking but also if the weight of the evidence (pro and con) taken as a whole did not in his opinion support the verdict. *Montgomery Ward & Co.* v. *Duncan* (1940) 311 U.S. 243, 251; *Murphy* v. *U. S. District Court* (9 Cir., 1944) 145 F.2d 1018, 1020; *McCracken* v. *Richmond F & P R Co* (4 Cir., 1957) 240 F.2d 484. This is more power than the Court of Appeals had in order to reverse upon insufficiency of the evidence.

With the trial judge having so carefully considered Respondent's motion for a new trial and having had the feel of the case that no printed appellate record

could ever impart, *Cone* v. *West Virginia Pulp & Paper Co.* (1947) 330 U.S. 212, this Court should assume that the trial judge considered that not only was the evidence substantial but that its weight as well was in full support of the verdict and that if this was not so he would have granted the motion for a new trial. This being the case, on a petition for certiorari or rehearing thereof, this Court should presume that in all probability the Court of Appeals in reversing the trial judge solely for insufficiency of evidence did so by re-examining the facts, as forbidden by the Seventh Amendment. Unless this Court gives weight to the trial judge's views, which the Court of Appeals neglected to do, the federal trial system will be greatly impaired at the trial level.

CONCLUSION

Duty versus time. We are sure this Court recognizes its duty to give living effect to the Seventh Amendment as much as to any other in the Bill of Rights. We, in turn, are appreciative of the fact that the only way a violation of the Seventh Amendment can be detected is to examine the record in each case; a chore that is most taxing upon the time of a very busy Court. We humbly suggest that this Court in striking a balance between duty and time, vote in favor of duty where, as in the case at bar, the Court of Appeals reversed because the trial judge *denied* a motion for judgment n.o.v. and in the alternative a new trial. This is something which the Ninth Circuit Court of Appeals has never done prior to now and something which is truly a rarity in other circuits. By such a policy, the proba-

bility is great that it would be selecting to review more cases having true violations than otherwise; would not permit the lower Courts to believe that the Seventh Amendment is dead; and would be giving needed support to the many District Judges who, day to day, decide causes at the trial level.

Wherefore, Petitioner prays for rehearing and the ultimate granting of certiorari and reversal of the case at bar.

Respectfully submitted,

WILLIAM F. WHITE,
WHITE, SUTHERLAND & WHITE,
1200 Jackson Tower,
Portland, Oregon,

CAMERON SHERWOOD,
SHERWOOD, TUGMAN & GREEN,
Baker Building,
Walla Walla, Washington.

CERTIFICATE OF COUNSEL

I, William F. White, being a member of the Bar of this Court and the attorney who prepared this petition for rehearing, do hereby certify that the petition is presented in good faith and not for purposes of delay and, in my opinion, it is restricted to the grounds for such a petition as set forth in Rule 58 of this Court.

WILLIAM F. WHITE